IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 335.

CHARLES T. DOUDS, Regional Director of the Second Region of the National Labor Relations Board, For and On Behalf of the National Labor Relations Board, Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, INDEPENDENT, and LOCALS 856, 824, 874, 895, 920, 975 and 1258, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, INDEPENDENT; WILLIAM P. LYNCH, Secretary-Treasurer of Local 791; HAROLD BOWERS, Secretary of Local 824; and WILLIAM ACKALITIS, Business Agent of Local 874.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS HAROLD BOWERS AND LOCAL 824 IN OPPOSITION.

Question Presented.

Whether refusal by a longshoremen's union to work with members of a truck drivers' union in retaliation for the truck drivers having actively aided a rival longshoremen's union constitutes a secondary boycott in violation of Section 8(b)(4)(A) of the National Labor Relations Act, as amended, and therefore violates a restraining order couched in the language of that statute.

Statement.

The background facts of the case, which are determinative of the question presented here, were undisputed and were charged as matters of fact by the trial court in its charge to the jury (A. A. 39-42)*.

The incidents leading to the restraining order started on Pier 32 of the Moore-McCormack line in New York (A. A. 40). A longshoreman named Willie McMahon had terminated his employment with the Moore-McCormack line in October, 1953 but sought re-employment in February, 1954 (I 112). McMahon had been a shop steward of Local 895 of the International Longshoremen's Association, Independent (hereafter "ILA"), but had switched to the newly formed American Federation of Labor (hereafter "AFL") longhoremen's union in October, 1953 (I 100-02). On the threat of the AFL longshoremen's union to picket Pier 32 unless McMahon was re-hired, and upon the threat that Local 807 of the AFL Teamsters Union (hereafter "Local 807") would honor the picket line, the management of Moore-McCormack agreed to re-hire McMahon, and did re-hire him on February 23rd (A. A. 40). Thereupon the ILA members walked off the pier (A. A. 40).

On February 24th and 25th, no one showed up for work at Pier 32 except McMahon (A. A. 40). Therefore, on the morning of February 25th, on the protest of an ILA delegation at the re-hiring of McMahon, Moore-McCormack discharged McMahon and the ILA members went back to work (I 108-13; A. A. 40).

The next morning Local 807 started picketing Pier 32 (A. A. 41). The ILA members worked on Pier 32 on

* References to the record will be in accordance with Petitioner's practice as set forth in footnote 1, page 3 of the Petition. The opinion of the court below will be referred to herein at the pages where it appears in Appendix A of the Petition.

March 1st, 3rd and 4th, but there were no trucks servicing the pier because of the Local 807 picket line (A. A. 41).

In retaliation for this picketing at Pier 32, which had the effect of stopping trucks from servicing Pier 32 where the ILA members were working, the ILA started a movement in sympathy at other piers, refusing to load or unload trucks driven by members of Local 807 (I 177-79; A. A. 41).

When this occurred, Local 807 picketed the piers where there had been refusals to work Local 807 trucks; this had the effect of bringing work to a standstill at piers entirely separate from Pier 32 where the original dispute started (A. A. 41).

The New York Shipping Association, acting for employers on the piers affected by the work stoppages, filed a complaint with the National Labor Relations Board (hereafter the "Board"); this complaint led to the restraining order of March 4, 1954 (A. A. 41).

On petition of the Regional Director of the Board, on March 4th the district court issued a restraining order under Section 8(b)(4)(A) of the National Labor Relations Act, as amended, 29 U. S. C. 158 (b)(4)(A), directed to the ILA, eight named locals, and "their agents, servants, employees, attorneys and all other persons in active concert or participation with them" (A. A. 20-22, 39). This order was issued without formal notice to the respondents, and expired by its own terms on March 9, 1954 (A. A. 21, 39-40). The restraints imposed by the order will be discussed *infra*.

On March 9, 1954 the Regional Director of the Board filed a petition, with supporting affidavits, asking that the district court institute a prosecution of the respondents for civil and criminal contempt (A. A. 27-34, 41-42). By order to show cause signed the same date, the district court initiated the contempt proceedings, appointing the Board's attorneys to act for the court (A. A. 35-38).

Argument.

The restraining order issued *ex parte* by the district court on March 4, 1954 restrained "secondary boycott" conduct in the terms and language of Section 8(b)(4)(A) of the National Labor Relations Act, as amended. It did not restrain the specific conduct concededly engaged in by the ILA longshoremen, i. e. refusal to load or unload trucks driven by Local 807 drivers. Therefore unless the undisputed conduct constituted a secondary boycott, the respondents could not have been in contempt of the court's order.

The restraining order, in the terms of Section 8(b)(4)(A), in brief restrained pier employees from refusing to perform services for their employers where the objects of such refusal were

(1) to force their employers to cease doing business with trucking concerns employing members of Local 807, and

(2) to force customers of trucking concerns employing Local 807 members to cease doing business with said trucking concerns.

The facts brought out by the Board and so charged to the jury by the court indicate quite clearly that the conduct of the ILA members had neither of the above objects.

Local 807 interfered in the dispute on Pier 32, joining with its fellow AFL longshoremen's union in picketing and in refusing to cross the picket line. In reciprocation the ILA members refused to work with Local 807 men on other piers. The dispute was in the nature of a primary dispute between the ILA members and the AFL truckmen continued on other *situ*. Cf. *Schultz Refrigerated Service*, 87 N. L. R. B. 502, 508 (1949). There was absolutely no testimony that the refusal to service Local 807 trucks was

in any way directed at the pier employers, i. e., the New York Shipping Association and other employers, or at the trucking concerns themselves. Nor did the ILA have a labor dispute with the Moore-McCormack line, the primary employer. It was simply a display of ill-feeling between two unions.

As the court below stated, "the refusal to serve the trucks was a reprisal and retaliation against the '807' drivers" (Petition p. 31) and that "the 'object' of the 'Independent's' refusal to serve their trucks was not to advance the union solidarity, but a move against '807' for taking part in a dispute between itself and 'AFL-ILA'" (Petition p. 32).

The Court below properly held that such conduct does not constitute a secondary boycott under Section 8(b)(4)(A) as construed by this Court and lower courts. See cases cited in Petition, pp. 31-32, footnote 3; see also *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 473-74 (1921); *Douds* v. *Sheet Metal Workers International Ass'n*, 101 F. Supp. 273 (E. D. N. Y. 1951); *Elliott* v. *General Drivers, Warehousemen & Helpers, Local Union No. 968*, 123 F. Supp. 125 (S. D. Tex. 1954). Neither the cases nor the legislative history referred to by Petitioner supports a contrary contention.

Petitioner argues that the court below erred since a cessation of business between employers does not have to be the *sole* object of a strike in order to violate Section (8)(b)(4)(A). However, no evidence was introduced, or claim made at the trial, that a cessation of business between employers was *any* object of the ILA members' actions. Petitioner confuses the incidental effects of the actions with the objectives of such actions. As the court below stated, the *consequence* of *any* refusal to work must involve some cessation of business (Petition p. 33), but no showing was made that a cessation of work was an *objective* of the

refusal to work in this case (Petition pp. 33-35). The court below stated: ". . . the plaintiff did not show that the refusal was not a part of the struggle for power in the Port; as indeed it appears inevitably to have been" (Petition p. 36).

However, even if there had been evidence introduced at the trial that an objective of the refusal to serve Local 807 trucks might have been to cause a cessation of business between employers, such evidence would not have sufficed for the reason, among others, that the trial judge committed error by not leaving to the jury's determination the existence or nonexistence of such an objective. As the court below pointed out (Petition p. 34), and Petitioner admits (Petition p. 11), the trial court *left no question to the jury,* except whether the strike was a subterfuge for continuing the refusal to serve Local 807 trucks, and charged that such refusal to serve Local 807 trucks was an illegal secondary boycott which the court order had enjoined (A. A. 41, 46). This error alone would require granting a new trial.

Petitioner asserts further that the restraining order, though it did not restrain the refusal to service Local 807 trucks, should have been so construed because of the surrounding circumstances. The cases cited by Petitioner are not in point. The restraining order here was clear and unambiguous and cannot be extended to cure the Board's errors. If the restraining order had prohibited the specific conduct of refusing to service Local 807 trucks, even though such prohibition would have been jurisdictionally defective under Section (8)(b)(4)(A), the court's order, as stated below, "had to be obeyed, whether it was right or wrong" (Petition p. 35)*. Since the restraining order here was

* This statement should be qualified since the district court could not properly issue an injunction where it patently does not have jurisdiction. See *United States* v. *United Mine Workers,* 330 U. S. 258, 293 (1947). However, the question is not important here.

issued to come within the jurisdiction of Section 8(b)(4)(A), and the *trial court so charged the jury* (A. A. 43-44), it cannot be extended to cover conduct not proscribed by that section.

The court below did consider the recital in the restraining order that there was "reasonable cause to believe" that the respondents had violated Section 8(b)(4)(A),—but it followed the well-settled principle of criminal law which does not permit a loose extension of a specific prohibition (Petition pp. 35-36).

Reasons for Denying the Writ.

1. The decision of the court below is based not only on its correct interpretation of Section 8(b)(4)(A), but on the failure of proof by the Board as to any objective of causing a cessation of business between employers, and on the error in the trial court's charge to the jury. The court below granted Petitioner the right to a new trial if it so desires in order to supply, if possible, the factual deficiencies noted in the opinion below. Under such circumstances, this Court should not rule where such ruling may be unnecessary.

2. Even if it were proved that respondents' refusal to service the Local 807 trucks was intended to cause a cessation of business between the Shipping Association employers and the trucking companies or between those companies and their customers, there is doubt that such refusal would be within the prohibitions of Section 8(b)(4)(A). Prior decisions of this Court and lower courts do not decide this issue. As the court below stated:

> ". . . So in the case at bar, if the respondents' refusal to serve the trucks was merely to cause a cessation of business between the 'Association' and

> the trucking companies or between those companies and their customers, that may have been within the section, though not even that is perfectly certain as will appear . . . .
>
> "We have just said that it is not perfectly certain, even though the 'object' of the refusal had been to break up the business of the 'Association' or the 'customers' with the trucking companies, that the plaintiff would have proved his case. It so happens that in all the three cited decisions the union forced its employer to put a subcontractor off the job; it did not merely refuse to assist the work of the non-union men. We do not say that it should make a difference whether the cessation of business between third parties is brought about without the mediation of one of the parties affected; but we do wish to leave that question undetermined, and that we may for the reasons we have tried to state". (Petition pp. 34-35).

3. The decision of the court below does not have the general importance attributed to it by Petitioner. It pertains only to the very unique situation in this case. While Petitioner mentions the hundreds of charges filed each year under Section 8(b)(4)(A), it cites no case with facts similar to the instant case. Had the Board not delayed for such a long period in deciding the results of the certification proceedings of December, 1953, the unrest on the waterfront would undoubtedly not have erupted in the actions in question. It should be noted that the ILA is presently certified as representative on the waterfront, and there is no justification for Petitioner's statement (Petition p. 22) that "the rivalries which gave rise to the instant proceedings still persist".

4. Respondents raised many substantial questions in the court below, claiming that individually and collectively

they constituted reversible error. The court below reversed on the first issue raised and went no further. If this court should grant the petition for a writ of certiorari and should reverse the determination of the court below, this would not terminate the litigation since the action would have to be remanded to the court below for further consideration of the other issues raised.

We will discuss briefly these other issues in order to demonstrate their substantiality:

a. There was insufficient evidence to establish a *prima facie* case of violation of the restraining order as to respondents Bowers and Local 824.

The restraining order did not name Bowers as a respondent (A. A. 21) and he was not served with the order or given notice of its terms. The requirements of actual notice of an order of the court are strict, especially in a case subjecting a respondent to possible criminal penalties. *United States* v. *Hall,* 198 F. 2d 726 (C. A. 2, 1952), cert. denied 345 U. S. 905; *Kelton* v. *United States,* 294 F. 491 (C. A. 3, 1923), cert. denied 264 U. S. 590; *In re Kwelman,* 31 F. Supp. 23 (E. D. N. Y. 1939). The only substantive evidence adduced at the trial as to Bowers was to the effect that he remained passive and failed to take sufficient action to get the men back to work (I 887-98). This evidence was clearly insufficient. Further, the restraining order, in not naming Bowers as a respondent, was not specific enough to order him to active conduct. *Berry* v. *Midtown Service Corp.,* 104 F. 2d 107 (C. A. 2, 1939), cert. dismissed 308 U. S. 629; *In re Cary,* 10 F. 622 (S. D. N. Y. 1882); cf. *United States* v. *United Mine Workers,* 330 U. S. 258 (1947). In effect, the burden was erroneously put on the respondents on trial to exonerate themselves of the contempt charge. *Western Fruit Growers* v. *Gotfried,* 136 F. 2d 98 (C. A. 9, 1943).

The evidence against respondent Local 824 was substantially entirely vicarious liability through respondent Bowers, and to the extent it was insufficient against Bowers, it was insufficient against the Local. The Board made an abortive attempt to give Local 824 notice of the restraining order by serving a stenographer at the Local's office on March 8, 1954, one day before the end of the March 4th to 9th contempt period in question (II 1381-85). This was clearly insufficient under the restraining order's very terms, or the Federal Rules of Civil Procedure referred to therein (A. A. 22).

b. The trial court improperly admitted considerable testimony, the most prejudicial of which was testimony relating to the post-contempt period and other testimony irrelevant to any respondent on trial.

The contempt period in question was between March 4th and March 9th and the trial court so charged the jury (A. A. 47). However, a very substantial portion of the testimony dealt with events subsequent to March 9th. Such testimony was not admitted under any exception to the general rule such as concealment of a crime, flight, or similar exceptions. The trial court charged the jury that such evidence was received "for the purpose of throwing some light upon the conduct of respondents between March 4th and March 9th" (A. A. 47). However, the post-citation testimony was inflammatory and irrelevant to the charge against respondents. For example, there was considerable testimony by many witnesses as to riots, fights, cursing and picketing in New Jersey and Staten Island and other places by persons in no way connected with or acting on behalf of the respondents on trial (see, e.g., II 1303-37; I 481-501, 663-75, 736-39; II 1235-85). Motion pictures taken after March 9th on the waterfront were shown at

the trial (Pet. Exs. 50-51; VII 2859-79, 2884-86). All of this testimony was designed to and did prejudice respondents. Cf. *Krulewitch* v. *United States*, 336 U. S. 440 (1949); *United States* v. *Moran*, 194 F. 2d 623, 626 (C. A. 2, 1952). The magnitude of its harm cannot be adequately described in these brief lines.

c. The verified petition of the Board for adjudication in civil and criminal contempt was insufficient to charge respondents Bowers and Local 824 with criminal contempt since it was based on hearsay affidavits. Rule 42(b), Federal Rules of Criminal Procedure; cf. *Armstrong* v. *United States*, 18 F. 2d 371, 372 (C. A. 7, 1927), cert. denied 275 U. S. 534.

Further, there was a fatal variance between the contumacious conduct charged and the proof. The petition for adjudication in contempt against respondents Bowers and Local 824 is supported by hearsay affidavits of two longshoremen charging Bowers with actively calling a strike on March 5, 1954. Neither of these witnesses testified at the trial, and no other proof was offered to support this charge. As in any criminal case, a respondent in a criminal contempt case has a right to be informed as to his alleged contumacious activities, and to be tried on the facts charged. See *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, 444 (1911).

d. The failure of the trial court to grant respondents' motions for severances developed into prejudicial error as the trial unfolded. The long duration (six weeks) of the joint trial and the difficult, if not impossible task of the jury keeping separate in their minds the evidence against each respondent respectively were anticipated (I 33-36). Despite the fact that individual contempt citations were involved herein, with no conspiracy theory alleged or

proved, the trial court denied the motions (I 32, 48). The sole reason for trying the respondents together was for the sake of convenience.

Repeatedly throughout the trial requests were made by respondents' counsel for instructions segregating testimony admissible against only one or some of the respondents (see, e. g., I 241, 287, 370-71, 442-43; VI 2776). The trial court refused to give such instructions during the trial, stating that it would clarify matters "later" (I 442-43). However, the trial court failed to give any instructions on the subject in its charge. That the court and the jury failed to give each respondent the independent judgment required is apparent from the fact that one respondent, Local 975, was not mentioned at all in the Board's case, and yet was convicted. The error here claimed is the combined error first of failing to sever, and then failing to give adequate instructions to the jury during and at the close of the trial.

e. The trial court erred in its charge to the jury regarding the evidence against respondents Bowers and Local 824. The court stated:

> "Now, there has been testimony that George Bowers, a brother of Harold Bowers, did picket duty, and that the recording secretary of Local 824 and two shop stewards did picket duty. That testimony in and of itself standing alone would not warrant a finding of guilt against either Harold Bowers or Local 824. It should be considered along with all the other evidence bearing on the question of the guilt or innocence of these two respondents". (A. A. 53).

This, the only instruction given as to the evidence against either of these two respondents, was clear error. The testimony referred to was completely inadmissible

against Harold Bowers and could not be considered against him since there was no showing of any control by Bowers over the individuals involved, nor any instructions by him to them, nor even that he had knowledge of their activities. Further, as to Bowers and the Local, the instruction was improper since the testimony referred to took place in the post-citation period and was inadmissible *in toto.*

f. The trial record shows a clear pattern of impropriety by counsel for the Board constituting reversible error within the case of *Berger* v. *United States,* 295 U. S. 78 (1935). Most improper was the cross-examination of respondent Bowers.

Bowers testified in his own behalf and, in brief, denied violation of the restraining order and asserted that the rank-and-file members refused to service Local 807 trucks despite his, Bowers', requests to do so (VI 2649 *et seq.*). From the outset of his cross-examination he was viciously attacked.

Bowers testified on direct examination that he had never been convicted of a crime (VI 2649). Yet, the first question asked him on cross-examination was whether he had any "criminal record," a term which the Board's counsel used to include arrests as well as convictions (VI 2682; I 47). Bowers was then asked over objection whether he had been "arrested in 1929 under the name of Frank Donald" and repeatedly whether he had used the "alias" of "Frank Donald" (VI 2682-84). Questioning a defendant about arrests necessarily prejudices the jury and constitutes reversible error. See, e. g., *United States* v. *James,* 208 F. 2d 124 (C. A. 2, 1953); *Packineau* v. *United States,* 202 F. 2d 681 (C. A. 8, 1953). Further, since no question of identity was involved here, questioning as to an "alias" was highly improper. *United States* v. *James,*

supra; United States v. *Grayson,* 166 F. 2d 863, 867, 870-71 (C. A. 2, 1948).

Bowers was also improperly asked about appearances before a state crime commission and a Congressional investigative committee (VI 2684-85), both irrelevant but highly prejudicial. Further, the inference was conveyed to the jury that Bowers improperly retained union funds (VI 2687-88).

Counsel for the Board then attempted to show that Bowers associated with persons with criminal records (VI 2717-22). Such cross-examination to show the kind of persons with whom an accused associates is highly improper. *Templeton* v. *United States,* 151 F. 2d 706 (C. A. 6, 1945); *United States* v. *Chiarella,* 194 F. 2d 903, 911 (C. A. 2, 1950), judgment vacated and remanded for resentencing 341 U. S. 946, judgment modified 214 F. 2d 838 (C. A. 2, 1954).

Where a defendant does not put his general character in issue, specific acts of misconduct not resulting in conviction of a felony or crime of moral turpitude are not the proper subject of cross-examination for impeachment purposes. *United States* v. *Provoo,* 215 F. 2d 531 (C. A. 2, 1954), and cases cited therein, p. 536, footnote 6. Respondent Bowers did not put his character in issue. The improper questioning had no purpose other than to attempt to convict the respondent on inference of unsavory character and associates. Such questioning was not inadvertent,—counsel for the Board stated that he was trying to show the "general character" of the respondent (VI 2687; VII 3186).

The Board's counsel similarly questioned other witnesses (see, e. g., IV 1035-40, 1085-88; V 1645; VI 2368-69, 2382). There are many other instances of improprieties by the Board's counsel (see, e. g., I 658-59; VII 3156). The

pattern of misconduct, and the lack of rebuke or control by the trial court, constituted reversible error,—especially as to respondent Bowers who was tried on prejudice rather than evidence.

5. In the last analysis, what the Board has attempted, and still attempts to do herein, is to punish conduct which it dislikes, but which does not come within its jurisdiction. It has misused the courts, and now asks this Court's aid in its endeavor.

The court below indicated at the conclusion of its opinion (Petition p. 36) that the law in its present form does not furnish the relief sought by the Board for the labor conduct in question in this case. We submit that whether or not it should do so is a matter for the legislature, not the courts, to determine.

Conclusion.

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Harold Bowers and Local 824.

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September, 1955.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT WILLIAM P. LYNCH IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT WILLIAM P. LYNCH IN OPPOSITION

Question Presented

Whether the refusal by members of a longshoremen's union to work with members of a teamster's union, the refusal being in retaliation for the latter's active support of a rival longshoremen's union, constitutes an Unfair Labor Practice, *i.e.*, an illegal secondary boycott, and therefore a violation of Section 8(b)(4)(A), Labor Relations Act, as amended, and whether such refusal is violative of a temporary restraining order couched in the language of the statute.

Statement

On the 4th day of March 1954 the Honorable EDWARD J. DIMOCK, United States District Judge for the Southern District of New York, upon the *ex parte* application of the National Labor Relations Board (hereinafter referred to as the petitioner), signed a temporary restraining order, pursuant to the provisions of Section 10(l)* of the National Labor Relations Act, as amended, forbidding certain conduct by the International Longshoremen's Association, Independent (hereinafter referred to as Independent), various of its locals, and their agents (A. A. 20-22).**

The temporary restraining order signed by Judge DIMOCK was the culmination of a series of incidents, which grew out of a dispute at one pier in the Port of New York. The following facts are not now in dispute, and have not been disputed.

The Moore-McCormack Lines, operators of Pier 32, North River, New York City, were approached on February 23, 1954 by a former employee, Willie McMahon. McMahon, who had left Moore-McCormack's employment on October 1953, demanded: firstly, that he be rehired, secondly, that the employer name him shop steward for Pier 32. Supporting this demand were representatives of the International Longshoremen's Association, AFL (hereinafter referred to as AFL) who stated to representatives of the line that if acquiescence was not given to McMahon's demands, they would picket the pier; and representatives of Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, A. F. of L. (hereinafter referred to

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* 29 U. S. C. 158(b)(4)(A) and 160(l) are referred to throughout as 8(b)(4)(A) and 10(l) of the Labor Act, as amended.

** A. A. refers to "Appendix to Appellant's [below] Brief." Other references will be App. A or App. B referring to the respective Appendices annexed to the Petition. T. T. will refer to "Typewritten Transcript of Testimony at Trial."

as 807) who stated they would not cross AFL's picket line. This threat achieved the desired result and McMahon was rehired on February (T. T. Vol. I, 103-106).

When this occurred Independent's members did not appear for work at Pier 32 during the next two days. On those days McMahon and representatives of Moore-McCormack went to the hiring halls to secure labor. Failing to secure same, and upon the complaint of Independent, management discharged McMahon. The latter, on the day following, February 26, 1954, picketed Pier 32. The picket line was honored by 807, and no trucks went into Pier 32 (T. T. Vol. I, 106-115).

Members of Independent's locals then commenced a sympathy movement at other piers in the port, and refused to service trucks driven by members of Local 807 (*e.g.*, T. T. Vol. I, 216).

Local 807 then set up its picket lines at those piers where its trucks were denied service, thus keeping out all trucks (*e.g.*, T. T. Vol. I, 380).

The New York Shipping Association, representatives of the employers at the piers, filed complaints with the Board against Independent (Vol. I, 299) and 807 (Vol. I, 283-284, 299).

The Regional Director of the Board, pursuant to the provisions of Section 10(l) of the National Labor Act, as amended, presented an *ex parte* application to Judge Dimock seeking to restrain Independent's conduct. The petition alleged that the Independent's conduct was in violation of Section 8(b)(4)(A) of the National Labor Relations Act, as amended (A. A. 14-19).

The judge granted the application and signed a temporary restraining order at 2:34 P. M. on Thursday, March 4, 1954. This restraining order was directed to the Independent and eight of its locals (A. A. 20-22).

On the following day, Friday, the Port of New York was partially closed and by Monday, March 8, 1954, there was, except for isolated instances, a complete shutdown (*e.g.*, T. T. Vol. I, 536-537).

The respondent Lynch was served with the petition and the order to show cause at about 7 P. M., on March 9, 1954 (T. T. Vol. II, 1388, 1391).

Argument

The temporary restraining order entered by the District Court on March 4, 1954, proscribed certain conduct by the respondents:

> ". . . where objects thereof are 1) to force or require members of New York Shipping Association and other employers to cease doing business with trucking concerns employing members of Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and 2) to force or require customers of trucking concerns employing members of Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, to cease doing business with said trucking concerns . . ." (A. *A*. 21-22).

This order succinctly describes the conduct that it sought to enjoin. Conduct which Section 8(b)(4)(A) of the Act defines to be an Unfair Labor Practice, *i.e.*, an illegal secondary boycott.

Respondent now urges that since the petition charging the violation of the order embodied the complete terms of the restraining order, it was necessary for the government to establish not only that the respondents had caused a work stoppage, but a stoppage which had for its object, the

object proscribed in the order. And the Court below so held.

The government in its petition argues that this holding was incorrect, basing its argument on a correct, but in this instance an inapplicable, proposition of law. The petitioner states in substance, that just as long as it is established that one of the objects of a strike is the proscribed conduct, then it has proven its case. In support of this proposition it cites cases which were relied upon by the appellants, as well as the Court below. These primarily are cases in which this Court passed upon the meaning of 8(b)(4)(A), the "secondary boycott" provision in 1951. *Labor Board* v. *International Rice Milling Co., Inc.*, 341 U. S. 665 (1951); *Labor Board* v. *Denver Bldg. Council*, 341 U. S. 675 (1951); *Electrical Workers* v. *Labor Board*, 341 U. S. 694 (1951); *Carpenters Union* v. *Labor Board*, 341 U. S. 707 (1951).

However, these cases do not aid the petitioner's position. The Court below did not distinguish the law, either as established by this Court or as decided in other circuits. The Court below merely held that the petitioner failed in its proof and that the trial court had invaded the province of the jury.

The decision below is not in conflict with prevailing law. The ruling is that the petitioner failed in its proof of the existence of a Secondary Boycott. The Court, as petitioner now argues, did not emasculate the "sole object" doctrine. Rather, it held that the petitioners failed to prove that any object of the respondents, intermediate or otherwise, included the proscribed object.

This holding is not only reasonable, but the only logical one in light of what had transpired immediately prior to the issuance of the temporary restraining order, and what had been transpiring for months previous to that. As peti-

tioner concedes (Petition, p. 4) two unions were in conflict. Both sought exclusive representation of the longshoremen. An incident of the rivalry was that the New York Shipping Association suffered and could not conduct its business; the usual effect of strike activity. The effect is undoubtedly not desirable. Nor is the effect newborn. Rather it parallels labor's evolution, as Congress knew when the Labor Act was last amended. Despite this knowledge, Congress, in its attempt to aid the progress of labor and yet curtail certain activity, did not prohibit all conduct in 8(b)(4)(A), but certain conduct only.

This Court has ruled consistently with the reasoning and the obvious intent of Congress, for it has made it clear that before strike action is unlawful it must have a purpose of the character described in 8(b)(4)(A), which is something other than incidental affect, reasoning that every work stoppage has the effect of forcing others to cease doing business with the employer against whom employees have struck. *Auto Workers* v. *Wisconsin Board,* 336 U. S. 245, 253 (1949).

This dispute was between ILA members and the AFL truckmen. There was no testimony that ILA had a dispute with Moore-McCormack Line. As the Court below held, in substance, this was a retaliatory move by one union against another (Petition, p. 32).

The Court below held that not only did petitioner fail in its proof, but that the trial court erred in invading the province of the jury. The trial court charged the existence of a secondary boycott. This was more grievous error than the petitioner's failure of proof as to the existence of an object. The Court's charge (A. A. 40-41) is in direct contravention of the spirit of the Labor Act.

This charge presupposes that the restraining order, obtained by the government under Section 10(l) of the Labor

Act, *ex parte,* without a hearing but on supporting affidavits, instead of being but a vehicle to give to the issuing Court probable cause to believe a situation exists which warrants restraining, is conclusive and unrebuttable proof of the truth of the charges.

That this is not so is apparent from a mere perusal of Section 10(l) which provides in part:

> "That no temporary restraining order shall issue without notice unless . . . * and such temporary restraining order shall be effective *for no longer than five days and will become void at the expiration of such period.* Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: . . ." (Emphasis added.)

It need not be argued at length that action under 10(l) is conclusive of nothing, for this Court has stated that the statute means exactly what it says. It has ruled that:

> ". . . [10(l)] is designed to assist a preliminary investigation of the charges before the filing of a complaint. If the officer . . . has reasonable cause to believe that a charge is true . . . he shall petition an appropriate District Court for injunctive relief, pending the final adjudication of the Board. Such proceeding is independent of that on the merits under §10(a)-(d) . . . As held by the Board, N. L. R. B. at 1203-1204, and the court below, 87 U. S. App. D. C. at 297, 299, 186 F. 2d at 330, 332, the very scheme of the statute

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* Part omitted refers only to what the Board must plead to obtain an *ex parte* order.

accordingly contemplates . . . not [to] foreclosure a proceeding on the merits as is now before us." *Labor Board* v. *Denver Bldg. Council, supra* at 682.

Reasons for Denying the Writ

1. The holding of the Court below is not in conflict with law settled by this Court. Rather the ruling below is consistent with the very cases cited by petitioner. The ruling is based on a failure of material proof at trial and the trial court's erroneous charge to the jury. This Court's intervention is unnecessary, since the Court below granted petitioner a new trial, to remedy the failures and deficiencies if possible.

2. Petitioner attempts to magnify the importance of this case and of the ruling below. The ruling below does not change the administration of the Act, for it does not dwell on that point. The law of injunction is not effected. And lastly, the situation which existed between the rival unions is no more, since one union has been certified, is now; and will continue to be for more than another year, under its present contract, the sole bargaining agent of longshoremen.

3. The question of obedience to an order of the Court was not questioned below. Rather the Court conceded (App. A, p. 35) the order had to be obeyed whether the order was right or wrong. This concession has no bearing whatever on the question of proof of disobedience.

4. The Court below reversed on the first issue raised by appellants. The appellants below raised numerous substantial questions. Those questions have never been decided. Should this Court entertain the instant petition and

even reverse the Court below, the litigation would continue, and the Court below would be required to review the matter again.

The respondent Lynch raised the following questions:

a) Insufficient evidence to establish a *prima facie* case. No proof was introduced that Lynch had notice of the restraining order which it is charged he violated. In contempt cases, the burden of proof of knowledge is exceedingly high on the government. *United States* v. *Hall,* 198 F. 2d 726 (C. A. 2, 1952), cert. denied 345 U. S. 905. Lynch was not named in the original restraining order. Therefore a question arises as to what Lynch had to do to avoid being in contempt of an order that did not name him, and he did not know or understand. It has been ruled that an order of this type is insufficient. *Berry* v. *Midtown Service Corp.,* 104 F. 2d 107 (C. A. 2, 1939), cert. dismissed 308 U. S. 629.

b) Government's attorney committed innumerable improprieties during the course of the trial. At least fourteen instances were cited in Lynch's brief below. (*e.g.,* T. T. Vol. I, 658-9; Vol. IV, 1085-6; Vol. V, 1645-6; 2368-9; 2682-84; Vol. VII, 3150-51). This conduct occurred during the government's case, the unions' case and the individuals' case and while Lynch was on the stand in his own behalf. The conduct complained of was in direct violation of the rulings and admonitions of this Court, e.g., *Viereck* v. *United States,* 318 U. S. 236 (1942).

c) The trial court improperly admitted testimony of the post-contempt period, concerning persons and local unions not on trial; testimony that served to prejudice the respondents and was probative of nothing, even on an incorrect assumption, *e.g.,* that labor unions are not separate from their members. See *United States* v. *White,* 322 U. S. 694, 701-703. The testimony was never connected to the persons on trial. And since this contempt trial was before a jury,

the inadmissable testimony was doubly prejudicial. *Krulewitch* v. *United States,* 336 U. S. 440 (1949).

5. Admittedly, the situation in the Port of New York was difficult at the time of the events portrayed in the undisputed facts herein. It has continued to be extremely difficult, but the remedy is not to be found in this law, and the law should not now be emasculated, as it would be if the ruling below were disturbed. As Judge Hand of the Court below stated:

> "There may of course have been criminal incidents accompanying the refusal and the strike; but, if so, their punishment was a matter for the State courts. The losses occasioned to others—the 'Association,' the trucking companies and their 'customers'—by the refusals themselves were, however, incidents for which per se the law in its present form does not furnish any relief. Whether it should do so is of course not for us to say." (App. A, p. 36.)

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Office - Supreme Court
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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 335.

CHARLES T. DOUDS, Regional Director of the Second Region of the National Labor Relations Board, For and On Behalf of the National Labor Relations Board, Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, INDEPENDENT, and LOCALS 856, 824, 874, 895, 920, 975 and 1258, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, INDEPENDENT; WILLIAM P. LYNCH, Secretary-Treasurer of Local 791; HAROLD BOWERS, Secretary of Local 824; and WILLIAM ACKALITIS, Business Agent of Local 874.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT WILLIAM ACKALITIS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT WILLIAM ACKALITIS

Question Presented.

Whether refusal by a longshoremen's union to work with members of a truck drivers' union in retaliation for the truck drivers having actively aided a rival longshoremen's union constitutes a secondary boycott in violation of Section 8(b)(4)(A) of the National Labor Relations Act, as amended, and therefore violates a restraining order couched in the language of that statute.

Statement.

The background facts of the case, which are determinative of the question presented here, were undisputed and were charged as matters of fact by the trial court in its charge to the jury (A. A. 39-42)*.

The incidents leading to the restraining order started on Pier 32 of the Moore-McCormack line in New York (A. A. 40). A longshoreman named Willie McMahon had terminated his employment with the Moore-McCormack line in October, 1953 but sought re-employment in February, 1954 (I 112). McMahon had been a shop steward of Local 895 of the International Longshoremen's Association, Independent (hereafter "ILA"), but had switched to the newly formed American Federation of Labor (hereafter "AFL") longshoremen's union in October, 1953 (I 100-02). On the threat of the AFL longshoremen's union to picket Pier 32 unless McMahon was re-hired, and upon the threat that Local 807 of the AFL Teamsters Union (hereafter "Local 807") would honor the picket line, the management of Moore-McCormack agreed to re-hire McMahon, and did re-hire him on February 23rd (A. A. 40). Thereupon the ILA members walked off the pier (A. A. 40).

On February 24th and 25th, no one showed up for work at Pier 32 except McMahon (A. A. 40). Therefore, on the morning of February 25th, on the protest of an ILA delegation at the re-hiring of McMahon, Moore-McCormack discharged McMahon and the ILA members went back to work (I 108-13; A. A. 40).

The next morning Local 807 started picketing Pier 32 (A. A. 41). The ILA members worked on Pier 32 on

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* References to the record will be in accordance with Petitioner's practice as set forth in footnote 1, page 3 of the Petition. The opinion of the court below will be referred to herein at the pages where it appears in Appendix A of the Petition.

March 1st, 3rd and 4th, but there were no trucks servicing the pier because of the Local 807 picket line (A. A. 41).

In retaliation for this picketing at Pier 32, which had the effect of stopping trucks from servicing Pier 32 where the ILA members were working, the ILA started a movement in sympathy at other piers, refusing to load or unload trucks driven by members of Local 807 (I 177-79; A. A. 41).

When this occurred, Local 807 picketed the piers where there had been refusals to work Local 807 trucks; this had the effect of bringing work to a standstill at piers entirely separate from Pier 32 where the original dispute started (A. A. 41).

The New York Shipping Association, acting for employers on the piers affected by the work stoppages, filed a complaint with the National Labor Relations Board (hereafter the "Board"); this complaint led to the restraining order of March 4, 1954 (A. A. 41).

On petition of the Regional Director of the Board, on March 4th the district court issued a restraining order under Section 8(b)(4)(A) of the National Labor Relations Act, as amended, 29 U. S. C. 158 (b)(4)(A), directed to the ILA, eight named locals, and "their agents, servants, employees, attorneys and all other persons in active concert or participation with them" (A. A. 20-22, 39). This order was issued without formal notice to the respondents, and expired by its own terms on March 9, 1954 (A. A. 21, 39-40). The restraints imposed by the order will be discussed *infra*.

On March 9, 1954 the Regional Director of the Board filed a petition, with supporting affidavits, asking that the district court institute a prosecution of the respondents for civil and criminal contempt (A. A. 27-34, 41-42). By order to show cause signed the same date, the district court initiated the contempt proceedings, appointing the Board's attorneys to act for the court (A. A. 35-38).

ARGUMENT.

The respondent William Ackalitis, adopts the argument and reasons for denying the Writ as set forth in the brief furnished the Court in behalf of respondent, Bowers. The respondent, Ackalitis, believes that Mr. Norman S. Beier, of Roseman, Goldmark, Colin & Kaye, has set forth the reasons for denying the Writ with great clarity, erudition and unanswerable legal reasoning. Therefore, the writer believes that it would neither be helpful to the Court or to the cause of Mr. Ackalitis, to repeat the arguments against granting the Writ.

CONCLUSION.

For the reasons stated above, it is respectfully submitted that the petition for a Writ of Certiorari be denied.

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JOSEPH H. BRODERICK,
Of Counsel.

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HAROLD B. WILLEY, Clerk

IN THE

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Petitioner,

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Respondents.

BRIEF OF INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, INDEPENDENT, AND LOCALS 856, 874, 895, 920, 975 AND 1258 IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondents.

BRIEF OF INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, INDEPENDENT, AND LOCALS 856, 874, 895, 920, 975 AND 1258 IN OPPOSITION TO PETITION FOR CERTIORARI

In this brief Arabic numerals in parenthesis, unless otherwise indicated, refer to pages of Appellants' Appendix. Such Arabic numerals in parenthesis preceded by Roman numerals refer to the volume (Roman) and page (Arabic) of the typewritten minutes of the testimony.

In referring to respondent parties and others, when the full name is not used, the shortened forms mentioned in the opinion of the Court of Appeals (Petition, Appendix A, p. 28) will be employed. Those condensations are as follows: International Longshoremen's Association, Inde-

pendent, is referred to as the "Independent", Truckdrivers Local 807, as "807", New York Shipping Association as the "Association", the American Federation of Labor, as "AFL", and the Longshoremen's Association chartered by AFL as a contender for union representation of longshoremen at the Port of New York (and elsewhere on the eastern seaboard) as "AFL-ILA".

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, of which the petitioner herein seeks a review, appears as Appendix "A" to the petition (Petition, page 26), and has now been reported, *viz.*—

> *Charles T. Douds, Regional Director, Petitioner,* v. *International Longshoremen's Association, Independent, et al., Respondents,* 224 F. 2d 455 (Advance Sheet dated Sept. 19, 1955).

Question Presented

The sole question involved herein is as to whether the action of International Longshoremen's Association, Independent, and its Locals above enumerated (or any of those groups) in refusing to handle merchandise trucked by members of Teamsters Union, Local 807, under the circumstances disclosed by the record at bar, constituted a violation of the temporary restraining direction contained in the order to show cause issued by the United States District Court for the Southern District of New York on March 4, 1954. A copy of that order is included in Appellants' Appendix (20-2).

The order to show cause was made upon the Regional Director's petition approving and adopting a charge that respondents were violating and would continue to violate

Section 8(b), subsection (4)(A) of the National Labor Relations Act (15). The order, therefore, in terms which were express but not specific, conditioned its temporary restraining provision upon a determination as to the object of the strike or work stoppage ascribed by the Director to the respondents. This defining provision restrained these respondents until March 9, 1954 at 5:00 p. m. from:

> "Engaging in, or, by orders, directions, instructions, appeals, or other means, or by permitting any such to remain in existence or effect, inducing or encouraging the employees of members of New York Shipping Association and of other employers to engage in, strikes or concerted refusals in the course of their employment, to use, process, transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform services for their employers, where objects thereof are (1) to force or require members of New York Shipping Association and other employers to cease doing business with trucking concerns employing members of Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and (2) to force or require customers of trucking concerns employing members of Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, to cease doing business with said trucking concerns; * * *" (21-22).

The question presented, therefore, may be stated more precisely as the inquiry as to whether the facts sustain the Director's claim that the objects of the respondents fall within the limits of the order and of the statutory provision above quoted.

Statement

After a trial lasting six weeks, the District Court (Judge Harold P. Burke) in an extended charge (38-70) submitted to the jury the question whether the conduct of the defendants constituted a violation of the *ex parte* restraining order. The jury rendered a verdict in favor of the petitioner. From the judgment entered upon that verdict the respondents appealed to the United States Court of Appeals for the Second Circuit. That Court held, Judge Learned Hand writing, that the acts ascribed by the testimony to the respondents and the objects motivating those acts did not fall within the condemnation of the restraining order or of the statute [29 U. S. C. 151, 158 (b)(4)(A)—see Petition, Appendix B, p. 39] upon which the order itself was based. Circuit Judge Frank concurred with Judge Hand. Circuit Judge Swan dissented without opinion.

The import of this holding becomes clear upon an examination of the facts disclosed by the record—and the further facts which the Court of Appeals assumes for the purposes of its review.

Facts

The material facts have been stated in a condensed but complete summary in the opinion of the Court of Appeals and have been set forth in more detail and with differing emphasis in the petition and in the briefs of other respondents. We desire, however, to call attention to certain details, most of which indeed are noted but not stressed in the opinion of the Court of Appeals.

Prior to and in 1953 Independent was a longshoremen's labor union which included practically all the longshoremen employed in the Port of New York and was the bar-

gaining agent for longshoremen recognized by the New York Shipping Association, which was the representative of numerous steamship operators, stevedoring companies and others employing longshoremen.

Until 1953 the Independent was an affiliate of AFL. In the fall of that year, as the result of protracted disputes and tensions, Independent was expelled by AFL. Independent, however, continued to act as the bargaining agent for the longshoremen who were members of its various locals. AFL chartered a new union, AFL-ILA, which promptly began an active proselyting campaign to induce members of Independent and its locals to switch to AFL-ILA.

Independent, failing to agree upon a new contract with the Association, called a strike on October 1, 1953, as a result of which an 80 day injunction under the Labor Management Relations Act was obtained by the Attorney General of the United States. In obedience to this injunction, Independent ordered its members back to work and they went back.

In the meantime, AFL-ILA, the new union sponsored by AFL after its expulsion of Independent, filed with the Labor Board a petition for certification as the bargaining representative of the longshoremen in this port. Pursuant to that petition an election was held in December, 1953, at which the returns showed a majority for Independent. The Labor Board, however, on objections to the election urged by AFL-ILA, withheld its certificate. [A second election was held later at which Independent again prevailed with the result that Independent eventually received the Labor Board's certificate as the bargaining representative of the longshoremen in this Port.] On March 4, 1954, prior to the conclusion of the hearings on the objections made by AFL-ILA to the election of December, 1953, the District Court granted the order to show

cause with the *ex parte* preliminary restraining direction which the petitioner claims to have been violated by Independent and its locals.

The events leading to the proceedings initiated by that order to show cause began, as the trial court charged (40-41), not with any action of Independent but with the effort of one Willie McMahon to take over Pier 32, North River, on behalf of AFL-ILA. McMahon had been a member of the local of Independent working at that Pier and had been employed by the Moore-McCormack Line. He had, indeed, been shop steward of that local. Following the expulsion of Independent from AFL and the attempt of AFL to supersede Independent by AFL-ILA, McMahon had resigned and joined AFL-ILA. Later, after the election of December, 1953, at which AFL-ILA failed to get a certificate, McMahon was re-employed by the Moore-McCormack Line on Pier 32.

The incidents of his reemployment afford details which are significant as to the object of the actions taken both by the respondent labor union and locals and by the groups which were contending with the respondent for recognition as the bargaining agent of the longshoremen at this Port. These incidents are hardly suggested by the statement in the petition (5) that—

> "About 4 months later, however, on February 23, 1954, AFL-ILA prevailed upon Moore-Mac to rehire McMahon to work on Pier 32 (I-105-106)."

This statement will be more informing and more consonant to the actual record if we note the manner in which AFL-ILA did "prevail" as above stated. It appears in the record without dispute and was so charged (40) that the representatives of 807 informed Moore-McCormack that unless McMahon was rehired the pier would be picketed. At the same time representatives of Local 807 in-

formed Moore-McCormack that the picket line thus created would be honored by that local and that truck drivers of that local would not cross such picket line (1-103-106). This "persuasion" was employed although the rehiring of McMahon was unfair because it ignored the seniority rights of members of Independent.

That rehiring, together with the threats that induced it, involved, of course, a further attack upon the position of Independent because McMahon was no longer a member of Independent but of a different and hostile union. Accordingly, when McMahon was reemployed at Pier 32, the members of Independent working at that pier refused to work with him. Thereupon the Moore-McCormack Lines, McMahon's employer, terminated his rehiring and discharged him. The members of Independent then returned to work but McMahon picketed the pier. Truck drivers belonging to Teamsters Union Local 807 made good their previous threat by refusing to cross the picket line established by McMahon's solo picketing. This action of 807 effectually stopped work on Pier 32, for drivers of all trucks feared and refused to cross the picket line of 807. This was the beginning of the "paralysis" of commerce at this port which became the subject of the petitioner's complaint. Following this action of the Teamsters Local 807, Independent did not strike but refused to handle at other piers merchandise for trucks driven by members of 807.

The charge of the trial court, after setting forth these facts, continued:

> "When this occurred, the AFL Teamsters picketed the piers where there had been refusal to work 807 trucks. *This* had the effect of bringing work to a standstill at locations and piers entirely separate and apart from Pier 32 * * *" (41, emphasis supplied).

It is to be observed, therefore, that the work stoppage underlying the complaint against Independent actually began with the refusal of members of a different union, 807, to transport merchandise to and from Pier 32 and was completed by the refusal of members of the same union to transport merchandise to and from any of the other piers at this port.

The conduct upon which the trial court permitted the jury to base its verdict of criminal contempt was simply the retaliatory partial withdrawal from work on the part of Independent directly provoked by the insistence of 807 that AFL-ILA must be treated as the bargaining agent for the longshoremen at the Port of New York.

It is obvious that here there was no secondary boycott because there was no dispute between any employer and its employees. The dispute was solely between two unions, each contending for recognition as the bargaining agent for longshoremen in this port. The various moves of AFL-ILA on the one hand and the counter moves of Independent on the other had as their sole object in every instance the weakening of the position of the opposing union or the avoidance of being injured by the hostile action of the opponent.

Upon the record as above summarized, these respondents (Independent and its Locals) contend that the petition for certiorari should be denied because:

1. Upon the facts of record the acts ascribed to Independent and its Locals and in particular the objects of those acts did not violate the direction of the District Court's order nor the provisions of the National Labor Relations Act.

2. The record at bar does not present a case of general consequence or otherwise appropriate to invoke the corrective action of this Court.

POINT I

Upon the facts of record the acts ascribed to Independent and its Locals and in particular the objects of those acts did not violate the direction of the District Court's order nor the provisions of the National Labor Relations Act.

The *ex parte* order which the respondents are claimed to have violated forbade them to strike or engage in concerted refusals to work, etc. where their object in so doing was to force members of the Association to stop doing business with members of Local 807 and other specified AFL affiliates, and to force customers of trucking concerns employing members of 807 and other AFL affiliates to cease doing business with such trucking concerns (21-2). Unless the actions of the respondents were motivated by one or the other of these objects, they were not forbidden either by the order or by the statute from which the order derives authority.

As the opinion of the Court of Appeals points out (Petition, Appendix A, p. 30), there is no proof that the retaliatory refusal of Independent and its Locals to handle merchandise from the trucks of 807 actually did result in any cessation of business between the employers of 807 drivers and those drivers or 807, their Local. But even if such cessation in fact occurred there would be no violation either of the restraining order or of the National Labor Relations Act unless the objects of the respondents were those described in the order.

The opinion of the Court of Appeals observed that any strike or any cessation of work or any refusal to handle goods in combination with other workers must inevitably result in some cessation or dimunition of business. If, however, the statute had contemplated a ban to cover all

cases where any such cessation or dimunition occurred, it would have been quite unnecessary to use the qualifying restrictive phrasing which is employed in the Act and paraphrased in the restraining order. [Such a sweeping provision would actually have forbidden any right to strike at all.]

Applying these limitations to the provisions of the restraining order and the underlying statute, it is obvious that the purpose and motivation of the respondents, even upon the view most favorable to the petitioner, was something basically and manifestly different from the conduct which is forbidden by the restraining direction and by the statute.

Independent and AFL-ILA were locked in an embittered contest for certification as the bargaining agent of longshoremen at this Port. 807, an AFL affiliate, actively and by work stoppage undertook to aid its AFL co-affiliate. In the course of this conflict McMahon picketed Pier 32, North River. 807 directed its teamsters to refuse, and they did refuse, to cross that picket line or transport any merchandise to or from that pier. This effectually closed up Pier 32. (A repetition of this proceeding at other piers would, of course, have brought about a like tie-up of general proportions.) Thereupon, members of Independent refused to handle merchandise from trucks of 807, which, in turn, picketed the piers of the Port generally (41).

It does not appear that the members of Independent also picketed the piers. Because of the 807 picketing, their drivers and drivers of other trucks, as well, refused to cross the picket line and practically no merchandise was reaching the piers. Independent and its locals did not picket. Its members cannot well be said even to have quit work. They simply did not work because there was no merchandise on the piers requiring the labors of long-

shoremen. This is not inference, it is the express import of the charge (41).

The actual cessation of business on the piers, according to the charge itself, throughout the entire waterfront of the Port was caused by the picketing activity of 807, just as the beginning of the stoppage of commerce at Pier 32 was caused by the McMahon picketing of that pier (41).

But, irrespective of who actually caused whatever cessation of business resulted from this contest between competing labor unions, it is manifest that the object of Independent was not either of those described in the restraining order. This different motivation was stated by Judge Hand in the opinion of the Court of Appeals as follows:

> "In the case at bar it is true that the '807' drivers were in a different craft from the longshoremen; but the 'object' of the 'Independent's' refusal to serve their trucks was not to advance the union solidarity, but a move against '807' for taking part in the dispute between itself and 'AFL-ILA.' If this was within the statute *it means that a union may not advance its own cause in a dispute with another to gain representation, if the step it takes causes a cessation of business between its employer and a third person, or between two third persons.* It is one thing to say that such interference is unlawful when its 'object' is the promotion of unionism in general, and a very different thing to forbid such a sanction as part of the contest for control" (Petition, Appendix A, pp. 32-33).

Judge Hand's analysis and his conclusion as to the actions and objects of Independent and its Locals is supported not only by the natural meaning of the language of the Act and the restraining provision of the order but by well considered judicial decisions.

It should not be necessary, we believe, even if it were possible, to enter upon an exhaustive examination of the apposite authorities. The language of the statute itself and the recent decisions of this Court cited by the Court of Appeals (p. 31) are sufficient, it is submitted, to sustain the judgment of the Court of Appeals. Those decisions are:

National Labor Relations Board v. *International Rice Milling Co.,* 341 U. S. 665;

National Labor Relations Board v. *Denver Building & Construction Trades Council,* 341 U. S. 675;

International Brotherhood of Electrical Workers v. *National Labor Relations Board,* 341 U. S. 694;

Local 74 v. *National Labor Relations Board,* 341 U. S. 707.

In the proceeding against International Rice Milling Co., *supra,* it was contended that the work stoppage there involved was a violation of the same statutory provisions which are invoked by the petitioner in the case at bar. This Court held in its unanimous opinion, Mr. Justice Burton writing, that the actions of the labor union did not fall within the condemnation of the statute.

In the case of *National Labor Relations Board* v. *Denver Building & Construction Trades Council, supra,* there was a difference of opinion among the Justices, but the holding of the Court was that the prohibitory clauses of the statute had been violated.

Although all of these cases involve the construction and application of the statutory provisions with which we are concerned in the case at bar, none of them concerns situations closely analogous to that which is presented here. The language of the opinions, however, does indicate that

conduct such as is shown in the case at bar falls well outside of the scope of the restraining provisions of the National Labor Relations Act and of the order of March 4, 1953.

In *National Labor Relations Board* v. *International Rice Milling Co., supra,* as in the case at bar, there was a contest between unions. In that case each union was seeking recognition as the collective bargaining representative of the operatives employed at a certain mill. The case was determined in favor of the union on the ground that the acts of the union pickets constituting the basis of the complaint had not been concerted. Some of the expressions in the Court's opinion, however, and some of its references to the legislative history of the statute concerned in that case and in this, tend strongly to support the position of the Court of Appeals herein that the acts of the respondents cannot reasonably be brought within the scope of those legislative provisions nor of the restraining direction in the Court's order which was intended to implement those provisions. Thus this Court said (341 U. S. 670-1):

> "While each case must be considered in the light of its surrounding circumstances, yet the applicable proscriptions of § 8 (b)(4) are expressly limited to the inducement or encouragement of concerted conduct by the employees of the neutral employer."

In footnote No. 8, 341 U. S. 673-4, appears the following:

> "* * * The primary strike for recognition (without a Board certification) is not proscribed."

Again, as stated in the same footnote, Senator Taft, floor manager for the bill in the Senate, said:

> "* * * All this provision of the bill [Sec. 8 (b)(4)] does is to reverse the effect of the law as to secondary boycotts."

As Judge Hand noted (Petition, Appendix A, p. 32) in his opinion in the case at bar, the essential and characteristic conditions of a secondary boycott are not only not shown but are negatived by the admitted facts in the instant case.

That actions such as those ascribed here to the respondents are not forbidden by the provisions of law upon which the petitioner relies nor by the provisions of the District Court's order herein, is further indicated by the following decisions:

Duplex Printing Press Co. v. *Deering,* 254 U. S. 443, 473-474 (1921);

Elliott v. *General Drivers, Warehousemen & Helpers, Local Union 968,* 123 F. Supp. 125 (S. D. Texas 1954);

Auto Workers v. *Wisconsin Board,* 336 U. S. 245, 253 (1949);

Schultz Refrigerated Service, 87 N. L. R. B. 502 (1949);

Douds v. *Sheet Metal Workers International Association Local Union 28,* 101 F. Supp. 273 (E. D. N. Y. 1951);

Douds v. *Metropolitan Federation, A. E. C. & T.* (1948, D. C. N. Y.), 75 F. Supp. 672.

On page 17 of the petition the petitioner has directed the court's attention to six cases offered by them in substantiation of the version of Section 8(b)(4)(A) which it has espoused herein. Not one of these precedents presents any factual analogy to the case at bar or supplies any reason for rejecting the conclusion reached herein by the Court of Appeals.

The frailty of the reasons upon which petitioner relies is likewise revealed by the extravagance of his claims respecting the scope of the Act. Petitioner argues (Petition, p. 20):

"* * * to achieve this objective Congress barred all strike action directed against, *or which has the effect of injuring,* the business of third persons not involved in the basic disagreement giving rise to the conflict". (emphasis supplied)

The import expressed in the italicized portion of this quotation finds no support whatever in the language of the statute. On the contrary, the act carefully confines its proscription to cases in which the object of the strikers was to injure third parties in the way defined in the words of the act. This was no inadvertence.

We have already quoted the language of Senator Taft to which this Court called attention in deciding the Denver case and the other cases reported in 341 U. S. The statements of Senator Taft show that what was intended was precisely what was expressed in the language of the act, *viz.*: the outlawing of strikes having the limited objects specifically stated in the act.

To ignore this limitation and read into the act a ban upon all strikes having "the effect of injuring the business of third persons" would extend its impact far beyond either the language or the purpose of the legislature. It would indeed bar all strikes.

But even if petitioner's "construction" of this statute be adopted the proof still fails to disclose any disobedience of the order of March 4, 1953. Judge Dimock, who signed that order, did not interpret the act as importing the all embracing scope ascribed to it by petitioner. Accordingly the judge forbade only strikes having the objects defined in the order.

As we have pointed out, the respondents, as the result of the picketing by 807 were left without work to do, but even if it be assumed that their conduct constituted a strike, their objects did not and could not have included those defined in the order.

POINT II

The facts out of which this proceeding arose are entirely unique and the case possesses no general significance whatsoever calling for the intervention of the United States Supreme Court.

It is, of course, well settled that the jurisdiction of this Court to issue the writ of certiorari does not contemplate a routine exercise of reviewing authority, but is to be invoked only when special circumstances require decision by the Court of last resort. United States Supreme Court Rule 19(1); *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251; *Brown* v. *Allen,* 344 U. S. 443, 491; *In re Woods,* 143 U. S. 202.

In *Hamilton Shoe Co.* v. *Wolf Brothers supra,* this Court said, Mr. Justice Pitney writing (240 U. S. at p. 258):

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."

The pronouncements of this Court are uniformly to like effect.

The facts and circumstances at bar do not bring the instant case within the scope of the principles governing the exercise of this extraordinary jurisdiction as above outlined. Even a casual perusal of the record of this prosecution will serve to demonstrate that the officials of the National Labor Relations Board had as much to do with bringing about the unhappy incidents which precipitated the strike in the Port of New York from February 27, 1954 to April 3, 1954 as the respondents herein. The sketchy outline of the facts set forth in the petition herein serves to spotlight the "unique" nature of this case right from its very outset. It is "unique" principally because the National Labor Relations Board was continually striving

by every means at its command to encompass the downfall of the I.L.A.—Independent in favor of its A.F. of L. rival. On pages 4 and 5 of the petition herein the following appears:

> "On October 8, 1953, AFL-ILA filed a petition with the National Labor Relations Board for certification as the exclusive bargaining representative of the longshoremen employed in the Port of New York (III-131-132). On December 23 and 24, 1953, the Board conducted an election to determine whether the old ILA or the new AFL-ILA, or neither, was the majority representative of these employees (Pet. Ex. 41). The election did not result in the certification of a representative because objections to the election were filed by the AFL-ILA, alleging, inter alia, that there had been violence and intimidation in connection with the polling in Brooklyn (III-151-154). Hearing on these objections was ordered by the Board and was in progress (III-152) when the following events occurred."

Nowhere can there be found any reference to the fact that the I.L.A.-Independent won the election, but was deprived of the victory through the pretext of violence and intimidation, nor is it disclosed that a second election supervised by the Board also resulted in victory for Independent. Neither is any indication given as to what the disposition of the alleged violence and intimidation charges would have been if AFL-ILA had emerged victorious in the first election. Apparently no consideration was given to the advisability of seeking an injunction against McMahon and the Teamsters when the demands were made by both of them for the re-employment of McMahon in February of 1954, to forestall the chaotic situation which finally came to pass, and when the National Labor Relations Board did secure an injunction, it was directed only against Indpendent and not against either the A.F. of L. Teamsters or AFL-ILA,

although McMahon, at Pier 32, with the approval and encouragement of Local 807, had started the picketing and precipitated the overall work stoppage which commenced when 807 set up picket lines at practically every pier throughout the port.

If the National Labor Relations Board had certified the first election or even if it had included McMahon and the Teamsters in its injunction application, the events of the ensuing weeks would have been forestalled and avoided. It is not to be anticipated that the National Labor Relations Board will indulge in any further manoeuvers of this stamp and it is therefore extremely unlikely that a case based on any such facts as these will ever again reach the courts. Nevertheless, the Court's attention is invited to the specious and absurd arguments advanced by petitioner in support of its application for certiorari on pages 20, 21, and 22. Petitioner there states that approximately 300 charges were filed with the Board in the "fiscal" year ending in June 1955, alleging violation of Sec. 8(b)(4)(a). It seems that 60 were deemed by the Board to have merit, so as to require invocation of the mandatory provisions of Sec. 10(1) for interlocutory injunctive relief, and ⅓ arose in the 2nd Circuit. Nowhere is there any scintilla of a flimsy claim made, except possibly by some form of indirection, that the facts in even one of these cases have anything to do with the instant case. From this omission it is of course obvious that no relevance exists.

The next non sequitur appears at the bottom of page 21, where it is stated:

> "Experience demonstrates that frequently the denial of injunctive relief under Section 10(1) marks the end of the unfair labor practice proceedings generally."

It would seem to be a rather elementary proposition that defeat for one or the other of the parties is a some-

what frequent way of achieving the very desirable result of concluding litigation.

Then the petitioner goes on to state with mysterious generalities, which are wholly incompetent and immaterial to the issues of this proceeding, as follows:

> "In such instances, the employers are often inclined to yield to such 'secondary' pressures, 'make their peace' with the union, and request the Board to permit withdrawal of the charges initiating the proceedings."

Perhaps it is the intention of the Board to apply the implications of this kind of unsubstantiated opprobrium to Independent. Its significance is indeed difficult to comprehend in the circumstances.

The final reason given in this petition (on page 22) for the granting of the application would be laughable if it did not amount to a surprising lack of candor with this honorable Court on the part of the National Labor Relations Board. The Board knows very well that AFL-ILA is dormant and dead, to all intents and purposes, in New York. Independent has a union shop contract in the Port of New York, and only its members are employed under its contract with the Association. There is certainly nothing of any "retaliatory" nature which Independent can carry on against the corpse of AFL-ILA. The only real danger stems from the apparent desire on the part of the Board to breathe life back into the AFL-ILA cadaver. That desire hardly constitutes an adequate basis for the issuance of a writ of certiorari.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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